**APPENDIX A**

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Jun. 30, 1995]

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Civil Action No. CV-94-074

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GARRIA SPENCER, *et al.*,

*Plaintiffs*,

v.

SHELL OIL COMPANY, *et al.*,

*Defendants*.

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ORDER OF CLASS CERTIFICATION

Plaintiffs have moved for an order pursuant to Rule 23, Alabama Rules of Civil Procedure, that this case may be maintained and certified a class action. On June 19, 1995, the Court heard extensive argument from the parties' counsel and admitted into evidence the parties' evidentiary submissions. The Court finds that there is sufficient proof in the record making it practicable for the Court to rule upon the Plaintiffs' Motion for Class Certification. Ala. R. Civ. P. 23(c)(1). The Court also finds that it has jurisdiction over the subject matter, the parties, and that venue is proper.

The Court is authorized to "make appropriate orders" under Rule 23(d)(1) for the conduct of class actions and to determine the course of the proceedings. The Court also is not bound by the class definition proposed by the Plaintiffs, and may adjust the definition and divide the class into subclasses, if needed. *Ex parte Hayes*, 579 So. 2d 1343, 1345 (Ala. 1991).

For the reasons stated below, the Motion for Class Certification shall be and hereby is GRANTED, and the class defined as follows shall be and hereby is CERTIFIED:

An opt-out plaintiff class as to Defendants, Shell Oil Company d/b/a Shell Chemical Company ("Shell") and Hoechst Celanese Corporation ("Celanese"), who are given notice in accordance with the due process clause of the U.S. Constitution and who are defined as follows:

> All persons and entities who presently own or who come to own before the end of the notice period or who previously have owned any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, provided, however, that the following persons and claims are excluded from the class:
>
> —All claims for personal injury;
>
> —Defendants, all manufacturers of polybutylene pipe, fittings, and/or components of polybutylene plumbing systems, and their parents, subsidiaries, affiliates, or controlled entities, and the officers, directors, agents, and employees of each of the foregoing;
>
> —All governmental entities, municipalities, and public or private water supply systems; and
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> —All persons or entities who, as of May 26, 1995, have filed an individual non-class, polybutylene plumbing system lawsuit against Shell and/or Celanese, or are members of the class certified in the polybutylene plumbing system class action pending in San Diego County, CA, or are individuals represented by and who shall be identified in writing by the Houston, TX law firm of Fleming, Hovenkamp & Grayson, P.C. or the San Antonio, TX law firm of Montgomery & Associates,

P.C., except that these persons or entities may "opt-into" this class action by a filing with the Clerk no later than ten (10) days prior to the start of trial.

All persons or entities who come to own after the end of the class notice period but prior to trial any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, may "opt-into" this class action at any time by a letter or other document filed with the Clerk no later than ten (10) days prior to the start of trial.

The Court finds that the above class definition, which is substantially in the form proposed by Plaintiffs, is fair and just. The Court further finds that such a class exists and is reasonably ascertainable in this litigation. The Court notes that, if necessary, this class certification may be modified as the case proceeds, including the establishment of subclasses.

*I. Introduction*

The named Plaintiffs are adult residents from Greene County, Alabama, Texas, and Illinois who own or previously have owned improvements to real property or structures in the United States in which there is or was during the time of such ownership a polybutylene plumbing system, or the components thereof, which was manufactured, designed, supplied, and/or contained materials sold by Defendants. Plaintiffs bring this cause of action pursuant to common law for damages and other relief. Plaintiffs allege that Defendants have committed torts and engaged in wrongful conduct, including breaches of warranty, in connection with the development, design, manufacture, marketing, sale, and

distribution of polybutylene plumbing systems[1] and their components. Specifically, Plaintiffs allege that Defendants Celanese and Shell are liable at law for damages to the class members for allegedly defective polybutylene plumbing systems.

Plaintiffs have settled their claims on a classwide basis with the other Defendant, E. I. DuPont de Nemours and Company ("DuPont"). The Court has preliminarily approved that Settlement. *See* Order No. 1. In Order No. 1, the Court made preliminary findings that the elements of class certification were present for purposes of the DuPont settlement. The Court, however, in considering the pending Motion for Class Certification, has decided to base its decision only on the arguments and evidence submitted by the parties at the certification hearing, rather than rely on the Court's preliminary findings and conclusions in Order No. 1.

As noted, the Court recognizes that a class certification order "may be conditional, and may be altered or amended before the decision on the merits." Ala. R. Civ. P. 23(c)(1); *First Ala. Bank v. Martin*, 381 So. 2d 32 (Ala. 1980). Resolution of the Plaintiffs' Rule 23 class certification motion is committed to the sound discretion of the Court, and the decision will not be overturned except for abuse of discretion. *Marshall Durbin Co. v. Jasper Util. Bd.*, 437 So. 2d 1014, 1026 (Ala. 1983). Plaintiffs bear the burden of proof of establishing that all requirements of Rule 23 have been met. *Ex parte Blue Cross & Blue Shield of Ala.*, 582 So. 2d 469, 477 (Ala. 1991); *Rowan v. First Bank of Boaz*, 476 So. 2d 44, 47 (Ala. 1985).

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[1] Plaintiffs have defined "polybutylene plumbing systems" as follows: "they refer to and include water supply plumbing containing, among other things, pipes fabricated, in whole or in part, from polybutylene, and fittings, including tees, elbows, and couplings, fabricated in whole or in part, from Celcon and/or Delrin acetal copolymer, whether sold and/or installed as a system or separately."

An inquiry into the merits of Plaintiffs' causes of action is inappropriate when making the class certification decision. *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1343 (Ala. 1994). Indeed, the substantive non-class allegations of the Plaintiffs' complaint are taken as true for purposes of deciding the class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). The Court, however, must make specific findings of fact as to the elements necessary for class certification, with Plaintiffs bearing the burden of persuasion. The Court notes that the Plaintiffs and Defendants, Shell and Celanese, have submitted substantial evidentiary materials and presented lengthy memoranda and arguments.

The Court finds it significant that in the *Beeman* case both Shell and Celanese agreed to a nationwide class certification in a Texas state court within the context of a settlement class. The only explanation provided to the Court by Shell and Celanese for their agreement to such in *Beeman* and their vigorous opposition to a nationwide class here was that *Beeman* was a settlement class.

This explanation is suspect at best. First, the same arguments made in opposition to certification here would be just as present in the context of a settlement, e.g., alleged unmanageability, atypicality of claims, differences in damages, and so on. Second, a court should determine on its own whether all the class action requirements are met, regardless of the parties' agreement, and should make specific findings. In requesting a settlement class in *Beeman*, Shell and Celanese were in effect asking that court to make the findings they do not want this Court to make. Finally, although invited by Plaintiffs' counsel to respond, neither Shell nor Celanese denied that they were attempting to settle their polybutylene problems on a nationwide class basis elsewhere.

Alabama Rule of Civil Procedure 23(a) sets forth prerequisites to *all* class actions. The requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all

members individually is "impracticable" [Rule 23(a)(1)]; (2) there are questions of law or fact common to the class [Rule 23(a)(2)]; (3) the claims or defenses of the class representative(s) are typical of the claims or defenses of the class [Rule 23(a)(3)]; and (4) the persons representing the class are able fairly and adequately to protect the interests of all members of the class [Rule 23(a)(4)].

After demonstrating that the Rule 23(a) requirements are satisfied and that an ascertainable class exists, Plaintiffs must *also* satisfy one or more of the elements enumerated in Rule 23(b) for maintaining the suit as a class action. *Eisen*, 417 U.S. at 163. The following element is particularly relevant to the present case: whether the questions of law or fact common to the class predominate over questions affecting the individual class members . . . and, on balance, a class action is superior to other methods available for adjudicating the controversy [Rule 23(b)(3)]. The Court will first analyze the Rule 23(a) requirements and later discuss Rule 23(b).

## *II. Rule 23(a) Requirements*

### *A. Numerosity*

The first requirement, numerosity, is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Ala. R. Civ. P. 23(a)(1). "Impracticable" does not mean "impossible"; Plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class. *In re Domestic Air Transp. Antitrust Litig.*, 677 F.2d at 698 (citing 3 Newberg, Newberg on Class Actions, § 18.03 at 455 (1985)). When the number of class members is large, as it is here, numerosity alone can establish impracticability and the Court need not look to other factors. *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989); *Thillens, Inc., v. Community Currency Exch. Ass'n*, 97 F.R.D. 668, 676-77 (N.D. Ill. 1983). Geographic dispersion of those class members is another signifi-

cant factor in the numerosity determination. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986); *Alvarado Partners, L.P., v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

The Court finds that any argument against numerosity is without merit. First, the record demonstrates that there are as many as six million housing units containing a polybutylene plumbing system. This number was not rebutted or contested by Defendants at the certification hearing. Moreover, the affected housing units and class members are dispersed throughout several states. Obviously, joinder of all putative class members would be impracticable, and result in serious hardship and inconvenience, and likely be impossible. The Court finds that the number of units coupled with the great geographic dispersion satisfies the numerosity requirement of Rule 23(a).

*B. Commonality*

The second element of Rule 23, commonality, is satisfied if there are some questions of law or fact common to the class. Fed. R. Civ. R. 23(a)(2). Clearly, there are many common issues among class members. For instance, there are common, if not identical, issues of fact relating to the historical development, chemical composition, design, manufacture, and marketing of polybutylene plumbing systems and their raw materials and components, the content and veracity of Defendants' representations, Defendants' claims history, if and when Defendants had notice of a defect, Defendants' documents, the parties' expert testimony, the testimony of Defendants' employees, and the like. There are also numerous common issues of law, including whether Plaintiffs can meet their burden on the elements of their various causes of action, as well as discovery and evidentiary issues of law. The majority of Shell and Celanese's defenses also present issues of fact and law common to the entire class. Therefore,

the Court finds that Plaintiffs have made the required showing of commonality under Rule 23(a)(2).

*C. Typicality*

Rule 23(a)(3) requires that Plaintiffs demonstrate that the claims or defenses of the class representatives are typical of the claims or defenses of the class. That is, the named Plaintiffs' claims are typical if they arise from the same event, practice, or course of conduct that forms the basis of the class claims, and if they are based on same or similar legal theories. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985).

The Court finds that the class representatives' claims arise from the same course of conduct by Defendants and the same nucleus of operative facts and are based on upon the same legal theories as those of the absent class members they seek to represent. The named Plaintiffs base their claims and the claims of those they seek to represent upon the wrongful and tortious conduct of Defendants as to polybutylene plumbing systems in general, and not as to a singular or specific system in an individual's housing unit. The Court finds that typicality is established because the class representatives must prove the same elements to establish their causes of action that the absent class members would need to prove to establish their causes of action if they brought individual claims against the Defendants. *In re South Central States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 416 (M.D. La. 1980). Accordingly, the typicality requirement for class members is satisfied.

*D. Adequate Representation*

The final requirement of Rule 23(a) is that the persons and counsel representing the class must be able fairly and adequately to protect the interests of all members of the class. Unquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action.

The Court is very familiar with the legal capabilities of Mr. Chestnut, Mr. Frazer, Mr. Whatley, Mr. Kuykendall, and Mr. Drake and find that their advocacy in this case and in other cases before this Court is and has been excellent.

Shell and Celanese, however, argue that Mr. Fleming is inadequate due to his representation of thousands of absent class members who are excluded by the class definition, as well as Mr. Fleming's opposition to the *Beeman* settlement class in Houston, Texas. These Defendants also contend that there is a conflict between the claims of Mr. Fleming's individual clients and the class members and that these supposed divergent interests prevent the same counsel from adequately representing the class.

The Court finds that there is no merit to these "inadequacy" arguments. Mr. Fleming and his law firm have an unblemished record of success in polybutylene plumbing litigation. His opposition to the *Beeman* settlement was motivated by his belief that the *Beeman* settlement was a "sweetheart deal" and thus unfair and inadequate for the class. He provided a very credible explanation for excluding his individual clients from the class, and the Court does not see any conflict in that regard, especially since Mr. Fleming represented that he may "opt-in" some or all of these clients through the "opt-in" provision suggested by the Plaintiffs. Additionally, Mr. Fleming's litigation performance in this case has been nothing but professional. The Court is convinced that Mr. Fleming will adequately and vigorously represent the class.

The test for adequacy of class representation focuses on whether the interests of the class representatives conflict with those of the class, and whether the class representatives will competently represent the interests of the class. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Shell and Celanese's attempted attack on the merits of the named Plaintiffs' claims is not a subject for consideration at the class certification

stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court finds that the named class representatives will fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class.

The Court also finds that Celanese's argument, that some of the putative members may not have Celanese's product in their housing units, is without merit. With respect to numerosity, commonality, and typicality, Plaintiffs are not required at this stage to prove that all of the putative members of a class are actual members. *Carpenter v. Davis*, 424 F.2d 257 (5th Cir. 1970). It is noteworthy that the named Plaintiffs may be supplemented or replaced by others at any stage of the litigation. *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994).

Defendants also assert that the Plaintiffs are not typical or adequate representatives of absent class members due to differences in their damages. Courts have generally declined to consider conflicts or differences in damages as sufficient to defeat the adequacy requirement. *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975). This is especially true when the class representatives and class members have a common interest in establishing liability against the defendants, as they certainly do here. Any conflict as to damages is merely theoretical at this point and is insufficient to defeat class certification. Accordingly, the Court is satisfied that Plaintiffs have established the adequate representation element of Rule 23(a)(4).

Accordingly, the named Plaintiffs are hereby appointed as class representatives to represent the class. Accordingly, the following attorneys are hereby appointed lead class counsel: J.L. Chestnut, Jr., T. Roe Frazer II, Joseph R. Whatley, Jr., Frederick T. Kuykendall III, George M. Fleming, and R. Jackson Drake.

For the foregoing reasons, the Court finds that Plaintiffs have satisfied each of the four requirements of Rule 23(a).

*III. Rule 23(b) Requirements*

After establishing that the requirements of Rule 23(a) are satisfied and that an ascertainable class exists, Plaintiffs must also satisfy one or more of the elements enumerated in Rule 23(b).

The Plaintiffs seek certification pursuant to Rule 23(b)(3) which requires that common questions predominate over individual questions and that a class action be the superior method of adjudicating the controversy. The Court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The issues affecting individual members pale in comparison to the numerous questions of law and fact common to all class members. That there may be some differences in applicable law and damages can be taken care of through a properly drafted case management order and/or jury charge.

Defendants argue that this class action would be unmanageable because proof of injury will require a multitude of individualized examinations. The Court is not persuaded that this case will require "mini-trials" on the issue of damages. The class action is not unmanageable. Proof of liability in this case can be established through common evidence, and damages can be proven largely using objective data and will not involve thousands of separate "mini trials" involving lengthy individual examinations of numerous class members. Furthermore, as the court held in *In re Asbestos School Litigation*, 104 F.R.D. 422, 432 (E.D. Pa. 1984), *aff'd in part, vac'd in part on other grounds*, 789 F.2d 996 (3d Cir. 1986), "the 'overwhelming weight of authority' holds that the need for individualized damages calculations does not diminish the appropriateness of class certification where com-

mon questions as to liability predominate." Several courts have certified nationwide class actions presenting much more challenging manageability issues than this case. *See, e.g., In re School Asbestos Litig.; supra; Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *In Re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). In *In Re Domestic Air Transp. Antitrust Litig.*, for example, the court certified a class action involving millions of class members and over 400 million transactions. 137 F.R.D. at 693.

Finally, the Court must determine whether the class action is the superior method of dealing with this controversy. If the question is close, courts should err in favor of class certification in order to protect the judicial system from repetitive litigation. There is no real question that a class resolution is much more favorable than individual trials which would be grossly repetitive of the common issues of fact, law, and liability.

The Court finds that if the class is not certified it is possible that many claims will not be pursued because the costs will exceed the possible recovery and because many class members may never know of their potential claims. Accordingly, the Court finds that a class action is a superior method of adjudicating this controversy for many good reasons, including: (1) any interest of class members in individually controlling the prosecution of separate actions is outweighed by the comprehensiveness and speedy resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the class have failed to result in relief to the overwhelming majority of class members, even in spite of the successful nature of that litigation; (3) it is desirable to concentrate the litigation of the claims in one forum; and (4) the Court foresees no peculiar or insurmountable difficulties likely to be encountered in the management of this class action.

The Court further finds that Plaintiffs have satisfied the requirements of Rule 23(b)(l)(A), as there is a risk that separate actions will be brought if a class action is not permitted. Numerous class actions have been filed in other states, and there will likely be more filed as well as numerous individual actions if a class action were not certified in this case. This likely would lead to the Defendants being exposed to inconsistent and varying adjudications, and potential incompatible standards of conduct.

*IV. Notice*

The Plaintiff's counsel are directed to provide the Court with a proposed notice, proposed notice plan, and proposed notice order as soon as is practicable following the entry of this Order. The notice and notice plan must be consistent with Rule 23, Alabama law, and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The Court has not been cited to enough authority to justify requiring Shell and Celanese to pay for the notice. The Court thus finds that Plaintiffs and/or Plaintiffs' counsel shall be responsible for paying for the notice and a ensuring that the notice is disseminated in accordance with the notice plan to be approved by the Court. The Court, however, finds that in the interest of resource conservation the notice of this class certification, in Plaintiffs' counsel's discretion, may be included in and incorporated into the notice to be disseminated of the DuPont settlement.

*V. Conclusion*

For the foregoing reasons, it is ORDERED that Plaintiffs' Motion for Class Certification is GRANTED and the class defined hereinabove is CERTIFIED.

IT IS FURTHER ORDERED that Shell and Celanese's separate motions to strike shall be and hereby are denied.

IT IS FURTHER ORDERED that Shell and Celanese's motions and requests to continue and/or adjourn the certification hearing are DENIED as moot.

IT IS FURTHER ORDERED that Shell's motion to reconsider Order No. 1 preliminarily approving the DuPont settlement shall be and hereby is DENIED.

SO ORDERED, this 30th day of June, 1995.

/s/ Eddie Hardaway, Jr.
EDDIE HARDAWAY, JR.
CIRCUIT COURT JUDGE

## APPENDIX B

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Nov. 17, 1995]

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Case No. CV-94-074

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GARRIA SPENCER, *et al.*, Individually and on Behalf of all Others Similarly Situated,

*Plaintiffs*,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; E.I. DU PONT DE NEMOURS AND COMPANY,

*Defendants*.

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### ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT AGREEMENT AND DISMISSING CLASS ACTION WITH PREJUDICE AGAINST E. I. DU PONT DE NEMOURS AND COMPANY

The motions of class counsel and defendant E. I. du Pont de Nemours and Company ("DuPont") for final approval of class action settlement ("DuPont Settlement") was heard this 17th day of November, 1995.

1. Garria Spencer, et al. instituted this Action by Complaint dated November 16, 1994, individually and on behalf of others similarly situated, against DuPont and other defendants claiming that defendants were liable for alleged defects in polybutylene plumbing systems. On May 4, 1995 plaintiffs and DuPont executed a Settlement Agreement and Stipulation dated June 27, 1995 which provide for settlement of this Action and an order dismissing this Action with prejudice, subject to approval of this Court. On May 12,

1995, class counsel and DuPont filed a joint motion for preliminary approval of the DuPont Settlement. Under the terms of that Settlement, DuPont agreed to reimburse homeowners for eight percent of the cost of replacement of their polybutylene plumbing system and eight percent of unreimbursed property damage. DuPont agreed to pay this amount without regard to whether a class member has yet suffered a leak in their polybutylene plumbing system; regardless of when the plumbing system was installed; and regardless of whether the plumbing system contains any of DuPont's acetal resin, Delrin.

2. After conducting a hearing, on May 25, 1995, the Court issued its Order Granting Preliminary and Conditional Approval of the DuPont Settlement.

3. Thereafter, notice in a form approved by the Court was disseminated to the class. The notice was sent via first class and by means of a massive national media campaign.

4. The Court ordered deadline to opt out of the DuPont Settlement expired on October 27, 1995. The Court ordered deadline to file objections to the DuPont Settlement expired on October 27, 1995.

5. The Court has been informed that, based upon negotiations occurring subsequent to the dissemination of the notice to the class, DuPont has agreed to raise its percentage contribution to the class for replumbs and damages from eight percent to ten percent. No other significant terms of the DuPont Settlement affecting the rights of the class have changed.

NOW THEREFORE, IT IS ORDERED:

6. The Settlement Agreement between Plaintiffs, on behalf of themselves and as representatives of the Settlement Class (as defined in paragraph 8 hereof) , and DuPont dated May 4, 1995, as subsequently modified by stipulation, is fair, ade-

quate and reasonable to the Plaintiffs, the members of the class, and DuPont. The Settlement Agreement is hereby formally approved in all respects and the parties are hereby ordered to consummate and perform its terms.

7. The Court finds that the form of notice satisfies the requirements of Rule 23 of the Alabama Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment in that it fairly and accurately described the pending Action and the DuPont Settlement. The notice advised class members of their right to be excluded from the class and that those who do not timely request exclusion would be bound by the judgment. The notice also advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont Settlement. Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein.

8. All conditions to the DuPont Settlement have been met. The Court, therefore, removes the conditional nature of its certification of the class and hereby enters a binding, final certification of a plaintiff settlement class ("Settlement Class") consisting of the following:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutylene plumbing system with plastic insert fittings made of acetal resin ("polybutylene plumbing system").

Excluded from the Class are:

> a. All persons who, in accordance with the terms of the Settlement Agreement and the Notice to the Class, have executed and mailed or submitted a timely request for exclusion from the Class;

b. The defendants, any and all manufacturers of polybutylene pipe, fittings and/or components of any and all polybutylene plumbing systems, the parent and any subsidiary, affiliate, or controlled entity of any of them, and the officers, directors, agents, and employees of each of them; all persons that have only yard lines as opposed to a polybutylene plumbing system;

c. All persons who as of May 12, 1995: (i) have pending an individual non-class lawsuit against DuPont in connection with a polybutylene plumbing system, (ii) are members of a class certified against DuPont in any polybutylene plumbing system class action lawsuit, (iii) are individual claimants represented by the Houston, Texas law firm of Fleming, Hovenkamp & Grayson, P.C.; or (iv) members of the certified class in San Diego County, California;

d. All persons who have previously executed a release in favor of DuPont regarding polybutylene plumbing systems;

e. All persons who had replumbs done before May 12, 1995, unless the homeowners was not fully reimbursed for the cost of such replumb;

f. All governmental entities, municipalities, commercial systems, and persons having yard line systems only; and

g. Any and all claims for personal injury or wrongful death.

9. Upon execution of this Order and by Order of this Court, plaintiffs and each other member of the Settlement Class, on behalf of themselves and their respective parents, subsidiaries, affiliates, related entities, successors and/or assigns, and their past, present, and future agents, representatives, servants, partners, executors, administrators, assigns, predecessors, successors, descendants, dependents, and heirs, shall be deemed to have fully released and forever discharged

DuPont, its parents, subsidiaries, affiliates, retailers, dealers, distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, present and former directors, officers, consultants, agents, stockholders and employees (who individually and collectively shall be referred to as the "Released Parties"), from any and all claims, demands, actions, causes of action, costs losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof, arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems; and, more particularly, but without in any way limiting the generality of the foregoing, the plaintiff and each member of the Settlement Class will be deemed to have released, remised, and forever discharged the Released Parties of and from any and all claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, and any and all claims related to any claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, in the above-captioned action (collectively the "Released Claims").

10. Upon execution of this Order and by Order of this Court, DuPont, its parents, subsidiaries, affiliates, retailers, dealers, and distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, past and present and former directors, officers, consultants, agents, stockholders and employees (the Released Parties) are forever discharged from any and all claims, demands, actions, causes of action, costs, losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof,

arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems.

11. Actual Class Members or those who thought they may be class members who have validly and timely requested exclusion may pursue their own individual remedies, if any.

12. The plaintiffs and all other members of the Settlement Class are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action.

13. All parties and non-parties are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems that are or could have been the subject of the above-captioned Action.

14. No further notice of the DuPont Settlement or the approval thereof is required.

15. The Court reserves jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members, (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing.

IT IS SO ORDERED, this 17th day of November, 1995.

/s/ Eddie Hardaway
EDDIE HARDAWAY
CIRCUIT JUDGE EDDIE HARDAWAY

## APPENDIX C

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

[Filed Nov. 17, 1995]

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Civil Action No. 18,844

CLASS ACTION
OBION COUNTY

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TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

*Plaintiffs*,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

*Defendants*.

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### FINAL JUDGMENT

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the settlement

and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et at. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et at. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and

enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for

delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17th day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN, Chancellor

## APPENDIX D

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

[Filed Nov. 17, 1995]

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Civil Action No. 18,844
CLASS ACTION
OBION COUNTY

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TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

*Plaintiffs*,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

*Defendants*.

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## FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement (the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agree-

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[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

ment"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the-class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor

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[2] *Spencer, et al v. Shell Oil, et al*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the Court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst

case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less: approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation, intensive, exhaustive, and often heated. The Court finds the Agreement is the result

of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et at. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added; and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the partries and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotia-

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[3] *Meers, et at vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

tions were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notices as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared 18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast

points across the United States through PR Newswire. The press release and media advisory were also disseminated to 46[illegible]edia outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N. D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed

and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed Settlement* required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak"—a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater—does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S. W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*,

618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4, *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the clash of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those indi-

viduals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
>
> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any

subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01., Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement

shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Michael Malone
W. MICHAEL MALONE
Chancellor

Entered: November 17, 1995